(4) 07-1043 4/10/08

IN THE
SUPREME COURT OF THE UNITED STATES

NEW YORK,

Petitioner,

-against-

ANTHONY HILL,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Anthony Hill, by counsel Robert S. Dean and Barbara Zolot, respectfully requests that this Court deny the Petition for Writ of Certiorari filed by the State of New York as there has been no showing that the issue presented is one that merits consideration by this Court.

OPINIONS BELOW

The relevant state court opinions are reproduced in Petitioner's Appendix in Support of Petition for a Writ of Certiorari, cited herein as "State App."

JURISDICTIONAL STATEMENT

The State has invoked this Court's jurisdiction under 28 U.S.C. § 1257(a) to review the opinion of the New York Court of Appeals reversing the judgment. As argued in more detail below, this Court lacks jurisdiction to conduct this review. Because the New York Court of Appeals relied solely on the State Constitution and state law for its determination, an adequate and independent state law ground bars review. Further, the New York Court of Appeals has

violated no federal constitutional principles. This Court has no supervisory power over state judicial proceedings.

STATEMENT OF THE CASE

In April 2002, respondent pleaded guilty to rape in the first degree in full satisfaction of the indictment. The court sentenced him to a determinate 15-year term. No mention was made, either during the plea or during the sentencing that followed one month later, of an additional five-year term of postrelease supervision. Respondent subsequently filed a post-judgment motion to vacate his plea, pursuant to New York Criminal Procedure Law § 440.10, asserting that his plea was involuntary because of the court's failure to inform him about post-release supervision. The trial court refused to vacate the plea, instead opting to resentence respondent, over his objection, to 12 ½ years in prison and 2 ½ years of post-release supervision.

REASONS FOR DENYING THE WRIT

I. AN ADEQUATE AND INDEPENDENT STATE LAW GROUND BARS REVIEW BY THIS COURT

This Court will not assume jurisdiction of a case resting on state law grounds. See Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945). Here, an adequate and independent state ground supports the determination of the New York Court of Appeals, barring review of the case by this Court.

First, in discussing the requirement of knowing and voluntary plea waivers, the New York Court of Appeals adverted only to the State Constitution, and directly relied on state common law. The court stated:

> As has been well-established in our law, when a criminal defendant waives the fundamental right to trial by jury and pleads guilty, due process requires that the

> waiver be knowing, voluntary and intelligent (see NY Const, art I, § 6; People v. Ford, 86 NY2d 397, 403 [1995]; see also McCarthy v. United States, 394 US 459, 466 [1969]["if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void"]). (State App. at 2a)(emphasis added).

The New York Court of Appeals' citation to McCarthy does not represent an intertwining of state and federal constitutional principles as the State claims. While the state decision cites language from McCarthy, this Court decided McCarthy pursuant to its supervisory powers over the lower federal courts, 394 U.S. at 464-65, and expressly stated that it was not reaching "any of the constitutional arguments petitioner urges as additional grounds for reversal." Id. at 465. Accordingly, its inclusion in the state court decision does not show that "the New York and federal due process rules regarding plea bargaining are coextensive." (Petitioner for Writ of Certiorari ["State Pet."] at 16). In fact, the New York Court of Appeals has interpreted the due process clause of the State Constitution more expansively to provide greater protection than its federal counterpart. See Cooper v. Morin, 49 N.Y.2d 69, 79-82, 424 N.Y.S.2d 168, 174-176 (1979). The New York Court of Appeals likewise relied wholly on state cases for the principle that a defendant who is not told about the direct consequences of his plea "may withdraw the plea and be returned to his or her uncertain status before the negotiated bargain." (State App. at 2a). Accordingly, the Court of Appeals decision is devoid of any reliance on federal constitutional authority for its determination, and rests on its own interpretation of state law and the due process clause of the State Constitution.

Further, respondent's case suffered from Catu error — the trial court's failure to advise respondent about post-release supervision in the course of his pleading guilty, thus violating People v. Catu, 4 N.Y.3d 242, 792 N.Y.S.2d 887 (2005). In Catu, the New York Court of

Appeals held that, "[b]ecause a defendant pleading guilty to a determinate sentence must be aware of the postrelease supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of postrelease supervision requires reversal of the conviction." Id. at 245. As the State notes, the New York Court of Appeals relied "extensively" on Catu and its progeny. (State Pet. at 16). However, Catu itself relied only on state law — People v. Ford, 86 N.Y.2d 397 (1995) — and included no federal caselaw or federal constitutional citations in so doing. See Catu, 4 N.Y.2d at 244-45.

Accordingly, this is not a case where the state court decision "fairly appears to rest primarily on federal law, or to be interwoven with the federal law. . . ." Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). This Court cannot conclude that "the state court decided the case the way it did because it believed that federal law required it to," id. at 1041, and must therefore deny the State's petition for lack of jurisdiction.

II. THE ALLEGED ERROR WILL AFFECT FEW, IF ANY, CASES BEYOND RESPONDENT'S.

Even if not barred by adequate and independent state law grounds, the facts of respondent's case are sufficiently unusual that any ruling from this Court would affect few people, making the case a poor choice for review by this Court. The State makes no claim in their petition that the alleged error — prohibiting the lower court from engaging in what they term "specific performance" of the bargain struck with respondent — has occurred with any frequency, or will have widespread effect. To the contrary, the State maintains that the modified sentence benefitted respondent by granting him a "windfall" (State Pet. at 8), and previously

endorsed the view that any "reasonable defendant" would prefer the modified sentence for that reason (State's Brief in the New York Court of Appeals at 22). By the State's own lights, respondent is a rare defendant, as most defendants would never have insisted on plea vacatur over a beneficial sentence modification.

The scenario here is thus a unique one, confined to New York State, not likely to be repeated even there, and making any ruling by this Court exceedingly narrow in its reach.

In People v. Catu, 4 N.Y.3d 242, 245, 792 N.Y.S.2d 887 (2005), the New York Court of Appeals held that postrelease supervision is a direct consequence of pleading guilty, and that a court's failure to inform a pleading defendant about this component of his sentence renders the plea unknowing and involuntary and requires reversal. In People v. Van Deusen, 7 N.Y.3d 744, 745-46, 819 N.Y.S.2d 854 (2006), the Court of Appeals held that plea vacatur was required where the trial court failed to advise the defendant about postrelease supervision, and, over defendant's subsequent motion to withdraw her plea, imposed a sentence including postrelease supervison that was within the bargained-for range of imprisonment. The case was "indistinguishable" from Catu insofar as the plea was not knowing, voluntary and intelligent. Id. In People v. Louree, 8 N.Y.3d 541, 545-46, 838 N.Y.S.2d 18 (2007), the Court of Appeals held that a defendant may challenge the sufficiency of the plea allocution on Catu grounds on direct appeal, notwithstanding his or her failure to preserve the issue for appellate review by means of a postallocution motion, and that a collateral motion will not lie. In summarizing the applicable rules, the Court of Appeals stated that "it is irrelevant that the prison sentence added to postrelease supervision is within the range of prison time promised at the allocution." Id. at 545. And in respondent's case, the Court of Appeals held that the trial court could not remedy

respondent's involuntary plea by modifying his sentence to equal the original sentencing promise. (See State App. at 4a-5a).

The decisions in Catu and its progeny are now well-known and understood by the lower courts. The Court of Appeals has fashioned rules for the lower courts to follow in this area, and has made the consequences of failing to follow them abundantly clear. Unquestionably, the number of defendants not informed about post-release supervision when pleading guilty will dwindle down to none or next-to-none within a relatively short period of time. There will be no occasion for trial courts to impose a remedy, or for the State to fret about the appropriate one, for there will be no defect to remedy.[1] Further, by making direct appeal the sole vehicle for raising such claims, the Court of Appeals has imposed strict limitations on a defendant's ability to bring a Catu claim. Under Louree, a defendant who fails to bring his Catu claim on his direct appeal may not do so later via collateral motion. Convictions will not be undone years after the fact, reducing potential obstacles to retrial. Because the number of defendants who will seek relief on Catu

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[1] The State has offered no figures on the number of convictions reversed on Catu grounds, but, from a survey of the appellate reversals, it would not appear overwhelming. Six defendants had their convictions reversed on Catu grounds in 2005, see People v. Catu, 4 N.Y.3d 242 (2005); People v. Bracey, 24 A.D.3d 363, 807 N.Y.S.2d 34 (1st Dept. 2005); People v. Tomasula, 24 A.D.3d 159, 805 N.Y.S.2d 339 (1st Dept. 2005); People v. Goodwill, 20 A.D.3d 931, 797 N.Y.S.2d 345 (4th Dept. 2005); People v. Cintron, 18 A.D.3d 322, 795 N.Y.S.2d 531 (1st Dept. 2005); People v. Feehan, 18 A.D.3d 279, 796 N.Y.S.2d 42 (1st Dept. 2005); six defendants had their convictions reversed in 2006, see People v. Van Deusen, 7 N.Y.3d 744 (2006); People v. Krug, 34 A.D.3d 1119, 824 N.Y.S.2d 499 (3rd Dept. 2006); People v. Armstrong, 31 A.D.3d 291, 820 N.Y.S. 210 (1st Dept. 2006); People v. Simpson, 30 A.D.3d 1112, 815 N.Y.S.2d 847 (4th Dept. 2006); People v. Evans, 30 A.D.3d 1130, 816 N.Y.S.2d 446 (1st Dept. 2006); People v. Weekes, 28 A.D.3d 499, 813 N.Y.S.2d 188 (2d Dept. 2006); six defendants had their convictions reversed in 2007, see People v. Hill, 9 N.Y.3d 189 (2007); People v. Louree, 8 N.Y.3d 541 (2007); People v. Woods, 46 A.D.3d 345, 847 N.Y.S.2d 552 (1st Dept. 2007); People v Pagan, 43 A.D.3d 1086, 843 N.Y.S.2d 101 (2d Dept. 2007); People v. Minter, 42 A.D.3d 914, 838 N.Y.S.2d 764 (4th Dept. 2007); People v.Yanas, 36 A.D.3d 1149, 828 N.Y.S.2d 663 (3rd Dept. 2007); and three defendants' convictions were reversed in the first three months of 2008, see People v. Cook, __ N.Y.S.2d __, 2008 WL 740345 (2d Dept. 2008); People v. O'Keefe, 48 A.D.3d 1265, 849 N.Y.S.2d 918 (4th Dept. 2008); People v. Thompson, 47 A.D.3d 648, 848 N.Y.S.2d 540 (2d Dept. 2008).

grounds will grow only smaller as time passes, the question of whether specific performance is an appropriate remedy will soon become academic and does not warrant this Court's attention.

Indeed, the class of cases for which the question of remedy will ever be an issue is even smaller. Since, as the State has urged in its petition, the defendant may generally be seen as benefitting when offered the chance of a new bargain that reduces the incarceratory portion of a sentence to offset the addition of a period of post-release supervision (State Pet. at 8), specific performance may well be the agreed-upon by the parties in lieu of plea vacatur. Only if the defendant, like respondent, wants plea vacatur notwithstanding any proposed sentence modification does the rule requiring reversal become relevant. The State itself cites only one other case — Van Deusen — where the Court of Appeals allegedly vacated a guilty plea "on the same erroneous ground" (State Pet. at 17, n. 17) — though their citation of Van Deusen is puzzling since the State previously argued that Van Deusen's facts were "strikingly different" than the facts in respondent's case, and that the Court of Appeals committed no error in vacating the plea (See State's Brief in the Court of Appeals at 28-30).

Accordingly, the limited number of cases that will present Catu error in the near future, and the even tinier number in which the Court of Appeals' rule in respondent's case would even operate, mandate denial of the State's petition.

III. THERE IS NO CONFLICT BETWEEN RESPONDENT'S CASE AND SANTOBELLO.

Even if this Court had the power to review the ruling in respondent's case, the Court of Appeals' holding requiring plea vacatur to remedy Catu errors presents no violation of federal constitutional law. Contrary to petitioner's claim, respondent's case is not inconsistent with

Santobello v. New York, 404 U.S. 257 (1971). The two cases present distinct violations that are remedied in different ways.

Santobello concerned a specific kind of plea breach — when the government breaks a promise that had induced the defendant to plead guilty. In Santobello, the defendant pleaded guilty to a lesser included offense in return for the prosecutor's agreement to make no recommendation as to sentence. At the sentencing hearing six months later, a different prosecutor from the same office recommended the maximum sentence. Id. at 259. There was no question in Santobello regarding the defendant's understanding of his plea agreement; the defendant's claim for relief stemmed solely from the prosecutor's broken promise. Id. at 262; see also id. at 268 (Douglas, J., concurring). The federal constitutional rule of Santobello requires that a promise by the prosecutor be honored as a matter of due process. As this Court stated: "[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. This Court in Santobello did not hold that failure by the government to fulfill a plea-inducing promise renders a plea involuntary or unknowing.[2] The due process violation occasioned by a Catu violation is of a different type. It does not concern a prosecutor's broken promise, but the court's failure to "ensure that a defendant, before pleading guilty, has a full understanding of what the plea connotes and its consequences."

See Catu, 4 N.Y.2d at 244-45. Catu error renders the defendant's plea involuntary. Id. at 245.

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[2] Justice Marshall's dissent in Santobello further reinforces that Santobello claims are distinct from involuntariness claims. Justice Marshall urged that a Santobello claim undercuts the defendant's waiver of constitutional rights, thus compelling plea withdrawal, 404 U.S. at 268. The majority rejected this theory, holding instead that a promise by the prosecutor upon which the defendant relies "must be fulfilled." 404 U.S. at 262.

The Court of Appeals' holding that respondent's involuntary plea must be set aside thus does not conflict with Santobello, because the two cases implicate different defects that allow for different remedies. Where a defendant possesses full information upon pleading guilty but the promise to him is later broken, the plea might be remedied by either specific performance or plea vacatur, as Santobello said and as the New York Court of Appeals acknowledged in respondent's case. See Santobello, 404 U.S. at 262-63 (remanding to state court for determination of remedy); State App. at 3a, n.1 ("When, at the time of a plea, a defendant possesses the requisite information to make an informed choice, the defendant's guilty plea is voluntary, so either the plea's vacatur or specific performance of the promise is appropriate.") But respondent's case is not a broken-promise case. Respondent, rather, did not have full information when he pleaded guilty, because he was never advised about postrelease supervision. Accordingly, as the Court of Appeals stated, "vacatur [is] the appropriate remedy." (State App. at 3a, n1). That the information respondent lacked when he pleaded guilty happened to concern a sentencing component does not change the nature of the plea's fundamental defect or convert it to a broken-promise case remediable by specific performance.

In distinguishing pleas that fail because they are involuntarily entered from those that falter because of a broken promise, the New York Court of Appeals did nothing new or controversial. In Chaipis v. State Liq. Auth, 44 N.Y.2d 57, 64, 404 N.Y.S.2d 76 (1978), the Court of Appeals court described Santobello as a "corollary of the prohibition on coerced guilty pleas," and explicitly stated that "if a prosecutor makes a representation within the scope of his power, and defendant acts in reliance upon the representation, defendant may be entitled to have the representation enforced, at least where merely vacating the plea would result in significant

prejudice to defendant (see People v. Selikoff, 35 N.Y.2d 227, cert. den 419 U.S. 1122)." The Court of Appeals distinguished this situation from unknowing pleas, declaring it a "truism" that a guilty plea "must be taken only when the defendant has knowledge and understanding of the consequences of the plea," and that "[i]f the plea be coerced, or if defendant's knowledge of its consequences not be explored sufficiently, the plea may be subject to vacation on proper and timely motion. Id. at 63-64.

The remedy ordered by the New York Court of Appeals in respondent's case, as well as in its prior cases, comports with this settled distinction and thus with Santobello. Compare People v. Gina M. M., 40 N.Y.2d 595, 597, 388 N.Y.S.2d 899 (1976)(reversing conviction and vacating plea where defendant was "inadequately, if not incorrectly, advised of the plea consequences") with People v. Torres, 45 N.Y.2d 751, 408 N.Y.S.2d 487 (1978)(where defendant's guilty plea was voluntary but the court failed to fulfill the promise to allow him to withdraw the plea should the court refuse or fail to adjudicate him youthful offender, Court of Appeals remanded for either resentencing or plea withdrawal); accord McCarthy v. United States, 394 U.S. 459, 469-70 (1969)(where court failed to ascertain on-the-record that the defendant's plea was knowing and voluntary, this Court orders the plea to be set aside, rejecting the Government's request that the case be remanded for an evidentiary hearing on the issue of voluntariness. "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him.").

This Court has no supervisory power over state judicial proceedings, and may intervene only to correct wrongs of constitutional dimension. See Smith v. Phillips, 455 U.S. 209, 221 (1982); Sanchez-Llamas v. Oregon, 126 S.Ct. 2669, 2679 (2006). No such wrong occurred here,

where the New York Court of Appeals correctly held that the lower court's failure to advise respondent of post-release supervision rendered his plea involuntary rather than simply upsetting his sentencing expectations. See State App. at 5a. Respondent's case and Santobello are not inconsistent for the simple reason that Santobello applies to a different situation entirely. The New York Court of Appeals correctly, and in violation of no federal constitutional rule, ordered vacatur of respondent's involuntary plea. The State is aggrieved by that fact, but that is not a reason for this Court to grant the State's Petition for Writ of Certiorari.

Finally, even if Santobello did apply to respondent's case, the New York Court of Appeals did not breach any constitutional precedent in ordering plea vacatur here. In Santobello, this Court said: "[T]he interests of justice and appropriate recognition of the duties of the prosecution in relation to promises made in the negotiation of pleas of guilty will be best served by remanding the case to the state courts for further consideration." 404 U.S. at 262-63. This Court continued that the "ultimate relief" was best left to the "discretion of the state court, which is in a better position to decide whether the circumstances of this case require only that there be specific performance of the agreement on the plea, . . . or whether in the view of the state court, the circumstances require granting the relief sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty." Id. at 263.

The State incorrectly casts this Court's statement regarding choice-of-remedy as "constitutional" precedent. (See State Pet. at 17). But this Court did not hold that the Federal Constitution mandated specific performance or compelled a court to consider both specific performance and plea vacatur. While due process requires the promise to be honored, this Court left it to the state courts to decide what would best do so. Therefore, even if Santobello applied,

the New York Court of Appeals violated no federal constitutional rule in deciding that Catu errors compel reversal. The Court of Appeals did nothing more than perform the task assigned to it by this Court, that is, deciding that in the particular circumstances of a Catu violation, the appropriate remedy for the state courts to implement is plea vacatur.

IV. FEDERAL CASELAW APPLYING HARMLESS ERROR PURSUANT TO FED.R.CRIM. PRO. 11(H) IS IRRELEVANT.

Petitioner urges this Court to grant certiorari on the ground that "the decision of the New York Court of Appeals conflicts with the holdings of virtually every federal appellate court to address the issue." (State Pet. at 9). These courts, petitioner states, have "found harmless the failure to inform a defendant about a term of supervised release (the federal analog to PRS), so long as the combined prison sentence and supervised release term do not exceed the total amount of time that the defendant knew he could spend in prison." (State Pet. at 9-10).

The conflict petitioner perceives between these federal courts and the New York Court of Appeals provides no reason for granting certiorari, for every one of the cases petitioner relies upon was decided under Rule 11 of the Federal Rules of Criminal Procedure. Rule 11(c) requires the district court to determine that the defendant understands the maximum possible penalty provided by law, including the effect of any special parole or supervised release term. Rule 11(h) expressly provides for the application of harmless error analysis, providing that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." Therefore, the conflict that petitioner identifies between federal law and the New York Court of Appeals on the issue of harmless error is irrelevant, for while this Court has plenary jurisdiction over federal courts of appeals, including supervisory power, it has "no

supervisory power over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension." Smith v. Phillips, 455 U.S. 209, 221 (1982); cf. Dickerson v. Minnesota, 530 U.S. 428, 437 (2000)("This Court has supervisory authority over the federal courts, and we may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals."). A conflict between the federal courts' application of the federal rules of criminal procedure and the New York Court of Appeals' application of the harmless doctrine presents no "wrong of constitutional dimension" and provides no basis for a granting of certiorari.[3]

[3] It is worth noting that under Rule 11(h), if the combined sentence of incarceration and supervised release exceeds the maximum term the defendant was told he could receive, the error is not harmless and the defendant's plea must be vacated. Any potential extension of the period of supervised release must be taken into account and must not exceed the maximum of which the defendant is advised. See United States v. Fuentes-Mendoza, 56 F.3d 1113 (9th Cir. 1995). Respondent was promised a sentence of 15 years, but, as the New York Court of Appeals noted, see State App. at 5a, n.2, and as petitioner does not dispute, see State Pet. at 13, the combined sentence of incarceration and post-release supervision could potentially exceed 15 years by six months. Accordingly, even if Rule 11(h) of the federal rules applied, the error of failing to advise respondent about postrelease supervision would not be harmless and would require vacatur of respondent's plea.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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April 11, 2008